UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 99-2523, 99-2916

CARLETON COLLEGE

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Carleton College ("the College") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board order issued against the College. The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended ("the Act") (29 U.S.C. §§ 151, 160(a)). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the College is located in the state of Minnesota, within this judicial circuit.

The Board's decision and order issued on April 30, 1999, and is reported at 328 NLRB No. 31. (JA 59-98.)[1] The Board's order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The College filed its petition for review on June 9, 1999. The Board filed its cross-application for enforcement on July 2, 1999. The petition and the cross-application are timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the College released employee Karl Diekman from his teaching contract because of his union activity, in violation of Section 8(a)(3) and (1) of the Act.

NLRB v. Transportation Management Corp., 462 U.S. 393 (1983); Concepts & Designs, Inc. v. NLRB, 101 F.3d 1243 (8th Cir. 1996); Handicabs, Inc. v. NLRB, 95 F.3d 681 (8th Cir. 1996), cert. denied, 521 U.S. 1118 (1997); Mississippi Transport, Inc. v. NLRB, 33 F.3d 972 (8th Cir. 1994).

STATEMENT OF THE CASE

Acting on charges filed by Karl Diekman, the Board's General Counsel issued a complaint alleging that the College had violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and

[1] "JA" refers to the Joint Appendix. "Br" refers to the College's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

(1)) by terminating Diekman's services in retaliation for his protected activity. (JA 61; JA 1-2 (Charge, Amended Charge), 3-6 (Complaint).) After a hearing, an administrative law judge agreed with the allegations in the complaint and found that the College had engaged in the alleged unfair labor practice. (JA 61-98.) The College then filed exceptions to the judge's decision with the Board. (JA 49-58.) The Board, in agreement with the judge, found that the College had violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)), and adopted the judge's recommended order. (JA 59.) The facts supporting the Board's order are summarized directly below; the Board's conclusions and order are described immediately thereafter.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; A Group of Adjunct Professors Form an Ad-hoc Adjunct Faculty Committee

The College is an 1800-student liberal arts institution in Northfield, Minnesota. (JA 61.) Like most liberal arts institutions, the College has numerous courses of study in traditional fields, one of which is music. The College's music department offers two tracks, classroom courses in music theory and history and an applied music program. (JA 62; 339.) The applied music program, which consists of hands-on education in music performance through individual lessons and various

performing ensembles, is taught primarily by part-time adjunct faculty. (JA 62; 109, 339-40.)

In Spring 1995, adjunct professors Karl Diekman and Eric Kodner, along with some of their colleagues, formed an ad-hoc adjunct faculty committee. (JA 65; 113, 529.) After informing the chair of the music department of its intentions (JA 539), the ad-hoc committee distributed a survey to the adjunct professors in the music department, soliciting their views on a variety of issues, including wages, workload, and employee/employer relations. (JA 65; 531-38.)

On June 1, 1995, Diekman, Kodner, and adjunct professor Lynn Deichert, representing the ad-hoc committee, met with music department chair Lawrence Archbold, his co-chair Steve Kelly, and seven other full-time faculty members to present the results of the survey. (JA 65; 125-26.) Archbold began the meeting by lecturing the committee members about "the roles between adjunct and tenured [professors] and the way that this has always been and the way it is now and the way it always will be." (JA 66; 126.) When the subject of higher wages in a unionized environment was raised, Kelly expressed his concerns about the economic effects on the department of additional wage burdens. (JA 66; 497-98.)

The remainder of the meeting was cordial, as members of the ad-hoc committee described the results of the survey. (JA 128.) As the meeting closed, Diekman and Kodner informed the assembled

faculty that, as the survey respondents urged, the ad-hoc committee would hold an election in the fall to select members for a permanent adjunct faculty committee. (JA 66; 128.) Kelly agreed that electing members to a permanent committee was a good idea. (JA 66; 231.)

B. The Adjunct Faculty Committee Holds an Election; the College Forms Its Own "Adjunct Faculty Concerns Committee" and Conducts an Election Concurrently With TAFC

As promised, the ad-hoc committee, now called The Adjunct Faculty Committee ("TAFC"), distributed ballots to the adjunct faculty on September 28, 1995. (JA 67; 553-54.) From the adjuncts nominated on the prior spring's survey, adjunct faculty members selected five representatives to serve on TAFC: Diekman, Kodner, Deichert, Jim Hamilton, and Elizabeth Ericksen. Participation in TAFC had increased since the spring, as more people voted in the election than had returned surveys. (JA 67; 556.)

In September 1995, as TAFC was organizing its own affairs, the College sent a memorandum to all music department faculty entitled "Report on the Applied Music Lesson Program." (JA 66; 761-66.) In this memo, authored by now music department co-chairs Kelly and Archbold, the College announced higher wages for adjunct faculty and a new promotion track. (JA 66; 761-62.) It also established new rules governing mileage reimbursements. (JA 66; 764.)

Additionally, even though the College was on notice that the adjuncts were forming a permanent committee with elected representatives, the College decided to create its own Adjunct Faculty Concerns Committee ("AFCC"). Unlike TAFC, which was composed solely of adjunct faculty members, the College's AFCC contained multiple full-time faculty members along with a limited group of adjunct faculty, one from each of four musical disciplines. (JA 66; 765.) On October 2, 1995, the College distributed a ballot to select the AFCC's adjunct representatives. (JA 555.)

In an October 26, 1995, memorandum announcing the results of the AFCC election, music department chair Kelly noted that some adjuncts had "expressed confusion over the election because a small group of adjunct faculty, unbeknownst to the department, ran a simultaneous election for their own separate committee . . . ." (JA 67; 557.) Although Kelly acknowledged that members of the "non-Departmental committee" may ask to meet with the AFCC, he made clear that, from the College's viewpoint, "there [was] . . . only one Departmental committee for adjunct faculty concerns, and it is the [AFCC]." (JA 67; 557.)

By a letter to Kelly dated October 30, 1995, TAFC responded to these comments. It expressed surprise with Kelly's assertion that he was unaware of TAFC's plan to hold elections and reminded him of the June 1, 1995, meeting where TAFC gave notice to the

faculty, including Kelly, of its intent to hold an election in the fall. (JA 68; 558.)[2]

C. TAFC Works With the AFCC to Present Its Concerns to the College; the College Agrees to Speak Directly With TAFC

Instead of abandoning its attempts to influence college policy regarding music department adjuncts, TAFC contacted the three adjunct professors serving on the College's AFCC. (JA 134-35.) Only John Ellinger, the AFCC "strings" representative, responded to TAFC's inquiries and agreed to bring TAFC's concerns to the music department's attention. (JA 135.)

Thus, when Kelly solicited the AFCC's advice about the College's Music and Drama Building, Ellinger went to Kodner and Diekman and asked what TAFC thought the building needed. (JA 68-69; 136.) In response, TAFC drafted a "wish list" for the building, which it sent to Ellinger; Ellinger, in turn, passed the wish list on to Kelly. (JA 69; 568-69, 570.) Kelly responded by memorandum on November 29, 1995, in which he addressed each item on TAFC's wish list, granting some of TAFC's requests and denying others. (JA 570-71.)

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[2] TAFC affixed the name of Jim Hamilton, an adjunct professor who had been elected to TAFC, to its response. According to TAFC, Hamilton had heard and approved the response before it was sent. (JA 68; 163, 262-63, 566-67.) Hamilton, however, sent a letter to TAFC on October 31, 1995, resigning from the committee. (JA 68; 565.) Seven months later, he sent a letter to Kelly stating that he had not authorized TAFC to place his name on its October 30 memo. (JA 68; 701.)

Although TAFC appreciated some of Kelly's overtures, it believed that the tone of Kelly's response was sometimes patronizing and confrontational. Additionally, TAFC thought that Kelly misstated facts and demonstrated a misunderstanding of the actual working conditions in the music department. TAFC memorialized these concerns in a memo to Ellinger, (JA 69; 572-73); however, "[t]here is no evidence that Ellinger ever showed [Kelly] this memorandum . . .," (JA 69).

TAFC, however, continued to lobby the College through Ellinger, its AFCC contact. On December 6, 1995, TAFC sent a letter to Ellinger critiquing a music department proposal to levy a $5 per student fee for instrument repairs. (JA 574-75.) On January 15, 1996, the committee again wrote Ellinger to comment on an apparent change in the policy regarding the registration and approval of student chamber ensembles. (JA 583.)

Finally, on January 30, 1996, at a meeting about non-TAFC related matters attended by Diekman, Kelly, and Dean of the College Elizabeth McKinsey, the College agreed to meet with TAFC one-on-one. (JA 70; JA 240.)

D. TAFC Meets With the Music Department Faculty; Frustrated by the Outcome, TAFC Sends a Formal Complaint to the College's Faculty Affairs Committee

On March 5, 1996, Diekman, Kodner, and Deichert of TAFC met with Kelly and Archbold, who by now were serving as the music department chair and the applied music program director, respectively. (JA 70-71; 143, 244.) TAFC prepared a written

agenda for the meeting, which set forth TAFC's research about adjunct music professors' salaries at institutions comparable to the College. The agenda also made TAFC's case for higher salaries and greater benefits. (JA 71; 587-92.) At the meeting, TAFC presented this agenda to Kelly and Archbold, and also discussed several other issues, including chamber music guidelines, potential medical and pension benefits, and possibly tenure. (JA 71; 143, 245.)

After the meeting, TAFC concluded that it was pleased to have a forum available to air its grievances; however, it was less than thrilled with the department's reception. Although Archbold showed interest in TAFC's concerns, Kelly appeared unwilling to consider the evidence supporting TAFC's plea for additional compensation and benefits. (JA 71; 144, 246.)

At the suggestion of Chemistry Professor Chuck Carlin, TAFC had been preparing a comprehensive memorandum on the applied music program for submission to the collegewide Faculty Affairs Committee ("FAC").[3] (JA 71; 147.) It finished the memorandum on February 27, 1996. (JA 71; 146.) TAFC, however, delayed submitting it to FAC until after it determined whether the March

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[3] The College's Faculty Affairs Committee is responsible for handling faculty grievances, addressing faculty well-being, and serving as a conduit between faculty members and the College administration. (JA 62; 420, 803.)

5, 1996, meeting would be constructive. (JA 71; 145.) Shortly after March 5, frustrated by Kelly's cold reception to its proposals, as well as by his history of animosity towards TAFC generally, TAFC forwarded its document to the FAC. (JA 71; 593-620.)

The TAFC memorandum was a comprehensive, 28-page document. First, the three TAFC committee members (Diekman, Kodner, and Deichert) detailed the history of TAFC and its acrimonious relationship with the music department. (JA 72-73; 593-98.) The memo then spent considerable time explaining the work performed by the adjunct faculty, and the adjuncts' integral role in the applied music program. (JA 598-603.) The memo also discussed compensation issues at length and addressed the inadequacy of the AFCC's "representation" efforts. (JA 605-10.) Finally, TAFC concluded its written presentation by offering at least 14 concrete suggestions for increasing morale among adjunct professors, addressing compensation issues, and protecting adjunct rights on a collegewide level. (JA 610-16.)

TAFC forwarded the memorandum to FAC shortly after its March 5, 1996, meeting with Kelly and Archbold. (JA 71; 621.) In a copy addressed to Kelly, TAFC stated:

> We hope you will understand the spirit in which this memorandum was written. This memorandum is not intended to be a condemnation of the Music Department or its policies, but rather is a sincere expression of our concerns for the future of the applied music and ensemble program at [the College].

(JA 621.)

Kelly, however, took the memorandum in a very different spirit. In a March 8, 1996, letter to Dean McKinsey, he asserted that "[t]he memorandum represents a few good points surrounded by a sea of misinformation, vague charges, and red herrings." (JA 73; 669.) Concluding his short note, Kelly complained that "FAC will [presumably] want to waste its and my valuable time with a response." (JA 73; 669.)

On April 30, 1996, Kodner and Diekman met with the FAC. (JA 73; 149, 252.) In particular, TAFC requested FAC to help soothe the tension between TAFC and the College through mediation or intervention. TAFC also requested FAC's help in eliminating the personal attacks, conducting the following year's TAFC election, and garnering the College's respect for many of the adjuncts' membership in the local American Federation of Musicians. (JA 73; 154, 254.) Importantly, FAC agreed that TAFC should be recognized and treated like other college committees. (JA 73; 254.)

E. Over the Summer, Kelly Prepares Disciplinary Recommendations Against Deichert, Kodner, and Diekman

At the end of the 1995-96 school year, Kelly requested and received the music department's approval to forward to the Dean recommendations to discipline Deichert, Kodner, and Diekman. (JA 81; 376.) Accordingly, on July 17, 1996, Kelly prepared three memoranda, each of which set forth grounds for taking punitive action against one of the TAFC members. (JA 81; 625-26 (Kodner), 631 (Deichert), 673-74 (Diekman).)

In Deichert's memorandum, Kelly proposed taking disciplinary action for two reasons, both of which were TAFC-related. First, Kelly resurrected TAFC's October 1995 letter in which it allegedly affixed Jim Hamilton's name without his permission. Kelly asserted that this "unauthorized use of another person[']s name represent[ed] a clear violation of common standards of professional behavior and honesty." (JA 81; 631.) Second, Kelly recommended disciplining Deichert for his role in writing TAFC's memorandum to the FAC. (JA 81; 631.) According to Kelly, "overstatements and misstatements" in the memorandum "fail[ed] in numerous instances the standards of accuracy and fair play that are demanded by [the College] and other institutions." (JA 631.) Violation of those standards was "a serious instance of destructive and unprofessional behavior." (JA 631.)

In his letter regarding Kodner, Kelly recommended disciplining Kodner, like Deichert, for his participation in the two TAFC letters. (JA 81; 625.) In fact, Kelly used the exact same language to justify his submission. Kelly also added another ground for punishing Kodner, asserting that he complained about the department to students.[4] (JA 81; 625.)

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[4] On January 22, 1996, Kodner had written Kelly a letter forwarding several student complaints about the style and ability of the College's Orchestra Director, Hector Valdivia. Kelly, however, did not mention this letter or its contents in his disciplinary recommendation. (JA 70; 584-86.)

Finally, Kelly's disciplinary recommendation for Diekman listed five reasons for punishment: he repeated the three violations he had already articulated against Deichert and Kodner, and added two others. (JA 81; 673-74.) In addition to the TAFC letters and alleged complaints to students, Kelly accused Diekman of threatening the employment of Hector Valdivia, a tenure-track professor with whom Diekman had clashed several times throughout the preceding year. (JA 81; 673.) Kelly's final charge against Diekman involved an incident in March 1996, where Diekman threatened to withhold student grades unless he received a mileage reimbursement check by its contractually guaranteed deadline.[5] (JA 81; 674.)

Upon receiving the recommendations from Kelly, Dean McKinsey declined to impose discipline on Deichert, Kodner, or Diekman. Instead, she summoned each of them to individual meetings to discuss the College's "professional expectations" before issuing their annual contract renewals. (JA 81; 448.) The College had not conducted these meetings in the past, and, for the 1996-97 school year, it only met with the three TAFC committee members. (JA 92; 388, 389-90.)

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[5] Diekman did not carry out his threat; his check was received on time. (JA 74; 249-50.)

F. The College Meets With Deichert, Diekman, and Kodner; Dean McKinsey Declines To Renew Diekman's Teaching Contract

Kelly and Dean McKinsey met Deichert first in late August 1996. (JA 82.) The meeting was quick and cordial. Kelly and McKinsey raised their concerns with Deichert's participation in writing the TAFC letters. Deichert simply stated that he would "like to move on from here." (JA 82; 395.) As Kelly later recalled, Deichert was "conciliatory" in tone and agreed to follow the College's expectations. (JA 82; 395.) The College subsequently renewed Deichert's contract. (JA 392.)

On September 5, 1996, Diekman met with Kelly and McKinsey. Professor Carlin of the FAC, whom Diekman invited to observe, was also present at the meeting. (JA 82; 261.) McKinsey began by reiterating the goals of the applied music program to Diekman, and then began to explain how Diekman's performance had fallen short of those goals. (JA 82; 261, 450.) In doing so, McKinsey essentially followed the script Kelly prepared for her in his July 17, 1996, disciplinary recommendation.

McKinsey first reproached Diekman for threatening to work against the tenure efforts of Hector Valdivia, the full-time professor who conducted the College's orchestra and supervised student ensembles. (JA 82; 451, 681-82.) Diekman and other TAFC members had repeatedly clashed with Valdivia throughout the previous year over issues such as teaching ability, work assignments, pay scales, and collegiality. (JA 70, 75-79.)

McKinsey asserted that Diekman had told two faculty members that he would work to "get rid of Valdivia," and implied that he would influence student opinion to do it. (JA 82; 380, 451, 681-82.) In the course of the meeting, however, McKinsey never told Diekman which faculty members had leveled these accusations. (JA 92.)

McKinsey then proceeded to charge Diekman with complaining to students about the music department. Again, neither McKinsey nor Kelly shared the specifics of the claim, although they had written evidence at the time. (JA 92; 392-93.) Diekman denied doing so, explaining that he would not have time to criticize the department in a short music lesson. (JA 83; 261.) He, however, did admit that students have complained to him about the department, but contended that he followed department policy by instructing those students to talk to the professor at issue or the department chair. (JA 83; 262, 381, 393.)

McKinsey next raised the issue of TAFC's signing Hamilton's name to its October 30, 1995, letter without his permission. Diekman responded as TAFC did when Hamilton first raised the issue 10 months earlier: He contested Hamilton's claim that he was unaware of the letter and recounted the phone call where he and Kodner read the letter to Hamilton. (JA 83; 262, 381-82, 453.)

The College's fourth concern was Diekman's threat to withhold student grades unless the College reimbursed him for his

mileage. Diekman did not deny making the threat, however, he asserted that he had a right to insist on receiving his mileage payment by its contractually promised date. (JA 83; 265, 453.)

Finally, McKinsey criticized TAFC's memo to the FAC. In particular, she attacked the tone and rhetoric of the memo, saying it was "inflammatory and unsupported by evidence." (JA 83; 683.) Contesting the substance of the memo, McKinsey asserted that "[p]rofessional norms require that arguments and allegations be accurate, fair, and supported by evidence. . . ." (JA 683.) Not surprisingly, this accusation thrust the meeting into a discussion of the memo's merits, and McKinsey and Diekman began arguing about the memo's points and factual assertions. (JA 83; 263, 452, 454, 683.)

McKinsey then asked Diekman whether he would commit to "professionalism and his obligations to the department." (JA 96; 736.) She never defined what those commitments entailed. Diekman avoided the question, claiming his loyalty was to his students and the adjunct faculty who elected him to TAFC. (JA 83; 386, 683.)

Throughout much of the discussion on all five charges, Diekman supplemented his answers with criticisms of Professor Valdivia and the department. (JA 82-83.) Diekman complained that the College's music program was the "laughingstock" of the Twin Cities. (JA 84; 385, 454, 684.) When McKinsey challenged this assertion, Diekman retreated, conceding that the classroom

music program was adequate, but still condemning the applied music program. (JA 84; 384, 684.) He told McKinsey that "you can say what you want but that's not what other people say . . . you can't put perfume on a pig." (JA 84; 265-66.)

As the frustration spiraled higher, McKinsey asked Diekman if he even wanted a contract. (JA 85; 455, 684.) As Diekman testified, he felt that McKinsey was asking him to grovel and forego union activity. (JA 266, 269.) Diekman told McKinsey that he did not want a contract; instead, he would think about it when he received it in the mail. (JA 85; 455, 684.) As the meeting ended, McKinsey asked Diekman again if he would affirm the College's professional goals, and he dismissively agreed with a wave of his hand. (JA 85; 269, 684.)

On the next day, September 6, 1996, McKinsey, Kelly, and Carlin met with Kodner. (JA 86; 159, 627.) Again, McKinsey followed Kelly's disciplinary recommendation to frame the issues; however, her meeting with Kodner was much more pleasant than the previous day's meeting with Diekman. Like Diekman, Kodner challenged McKinsey's assertion that TAFC signed Hamilton's name to the October 30, 1995, letter without Hamilton's knowledge, and contested the assertion that he complained about the department to students. (JA 87; 163, 628.) Finally, McKinsey raised the TAFC memorandum and asked Kodner if he "was willing to be a team player in the department." (JA 160.) Although Kodner defended the memo and the grievances it described, he nevertheless

accepted some of the College's criticism, attempted to explain the memo to McKinsey and Kelly, and asked to bury the hatchet. (JA 87; 160-61, 629.) At the end of the meeting, Kodner's contract, like Deichert's, was renewed for the coming year. (JA 165, 630.)

Diekman was not so lucky, however. By letter of September 9, 1996, McKinsey informed Diekman that the College was not renewing his contract for the 1996-97 school year. In justifying the decision, the letter set forth the five grounds Kelly had originally laid out in his July 17, 1996, disciplinary recommendation. (JA 62-63; 686-89.) Additionally, McKinsey cited Diekman's "negative" behavior at the previous week's meeting and his refusal to commit to "the good of the department" as reasons for the nonrenewal. (JA 689.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Fox, Liebman and Brame), in agreement with the administrative law judge, found that the College violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by refusing to renew Diekman's contract because of his protected activity. (JA 59.) The Board's order requires the College to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (JA 97-98.) Affirmatively, the order

directs the College to offer Diekman full reinstatement to his former position, to make him whole for lost earnings, and to post a remedial notice. (JA 98.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's conclusion that the College refused to renew Diekman's teaching contract because of his union activities. First, the Board properly found that Diekman's union activity was a motivating factor behind the College's decision to release Diekman from his contract. The strongest evidence sustaining this conclusion is the College's very admission that it terminated Diekman because of his involvement in protected activity. In particular, the College relied on the TAFC memo to FAC and Diekman's role in allegedly affixing Hamilton's name to a TAFC memo to justify its nonrenewal of Diekman's contract. Also, the College's articulated animus towards TAFC's members and activities further demonstrates its unlawful motive.

Although the College offered legitimate motives for terminating Diekman, the Board reasonably concluded that they did not withstand scrutiny. The College failed to fully investigate Diekman's alleged misconduct, or give Diekman a fair opportunity to respond. Additionally, it engaged in a suspicious rush to assemble a paper trail against Diekman in the days following the TAFC memorandum. These facts support the Board's conclusion that

the College's allegedly legitimate reasons for terminating Diekman were a pretext to cover unlawful conduct.

Finally, Diekman's behavior during the September 5, 1996, meeting and his failure there to commit to abide by "professional expectations" did not justify the College's refusal to renew his contract. As the Board found, the College provoked Diekman's defensive, and perhaps rude, behavior by its discriminatory singling out of the three TAFC activists for precontract-renewal meetings, its criticism of TAFC's efforts at those meetings, and its vague demands for "professional behavior." In such a situation, an employer may not discipline an employee for his defensive reaction. Moreover, the College deliberately phrased its demand for "professionalism" in a manner that implicitly ordered Diekman to forego union activity. The College could not legally discipline Diekman for refusing to cease working for TAFC. In sum, the Board's order is reasonable and supported by substantial evidence, and the Court should enforce it in full.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COLLEGE RELEASED EMPLOYEE KARL DIEKMAN FROM HIS TEACHING CONTRACT BECAUSE OF HIS UNION ACTIVITY, IN VIOLATION OF SECTION 8(a)(3) AND (1) OF THE ACT

A. Applicable Principles and Standard of Review

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." Accordingly, an employer violates Section 8(a)(3) and (1) of the Act by taking an adverse employment action against an employee for engaging in protected union activity.[6] See NLRB v. Transportation Management Corp., 462 U.S. 393, 397-98 (1983); Concepts & Designs, Inc. v. NLRB, 101 F.3d 1243, 1244 (8th Cir. 1996). Protected activity includes both union organizing activity and work on behalf of a labor organization. See NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639, 362 U.S. 274, 279 (1960) (organizing); NLRB v. City Disposal Systems, 465 U.S. 822, 831 (1984) (assisting a labor organization).

Whether an employer has acted lawfully under Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) in discharging

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[6] Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. A violation of Section 8(a)(3) of the Act therefore results in a "derivative" violation of Section 8(a)(1). See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 698 n.4 (1983) ("[A] violation of § 8(a)(3) constitutes a derivative violation of § 8(a)(1).").

an employee depends on the employer's motive. See Concepts & Designs, 101 F.3d at 1244; TLC Lines, Inc. v. NLRB, 717 F.2d 461, 463-64 (8th Cir. 1983). Under the Board's test for determining an employer's motive, approved by the Supreme Court in NLRB v. Transportation Management Corp., 462 U.S. 393, 400 (1983), the General Counsel must show that an employer's opposition to protected activity was a motivating factor in its decision to take adverse action against an employee. See Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083, 1089 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

If the General Counsel makes that showing, the Board will find that the action was unlawful unless the employer shows, as an affirmative defense, that it would have taken the same action against the employee even in the absence of the protected activity. Transportation Management Corp., 462 U.S. at 400-03. Accord Concepts & Designs, 101 F.3d at 1044-45; Mississippi Transport, Inc. v. NLRB, 33 F.3d 972, 979 (8th Cir. 1994). Where, however, the employer's proffered reason for the discharge is shown to be a mere pretext--that the reason does not exist or was not actually relied upon--it is apparent that the employer has failed to meet its burden, because only the unlawful reason remains. See Wright Line, 251 NLRB at 1084; accord Lemon Drop Inn, Inc. v. NLRB, 752 F.2d 323, 326 (8th Cir. 1985); NLRB v. Senftner Volkswagen Corp., 681 F.2d 557, 560 (8th Cir. 1982).

An employer rarely admits unlawful motivation, and so the Board may infer it from circumstantial as well as direct evidence. NLRB v. Link-Belt Co., 311 U.S. 584, 602 (1941); Concepts & Designs, 101 F.3d at 1244; NLRB v. Vought Corp., 788 F.2d 1378, 1382 (8th Cir. 1986); TLC Lines, Inc. v. NLRB, 717 F.2d 461, 464-65 (8th Cir. 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. In analyzing the evidence, circumstantial or direct, the Board is free to draw any reasonable inference." NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965).

Under Section 10(e) of the Act (29 U.S.C. § 160(e)), the Board's factual findings are conclusive so long as substantial evidence supports them. Substantial evidence, as the Supreme Court recently reacknowledged, exists when "a 'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.'" Dickinson v. Zurko, 119 S.Ct. 1816, 1823 (1999) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Board's findings are therefore entitled to affirmance if they are reasonable, and a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court might have made a different choice had the matter been before it de novo." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Accord Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1507 (8th Cir. 1993).

B. The College Refused to Renew Diekman's Teaching Contract Because of His Union Activity

As discussed below, the College acted on its dislike of TAFC's activities by requiring the three union activists to comport their behavior to vague "professional" norms, which, as the Board concluded (JA 96), necessarily included a promise to forego union activity. When Diekman refused to commit, the College refused to renew his teaching contract. In light of the multiple infirmities in the College's explanation of its actions, the Board reasonably found that the College violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)).

1. The College admitted that Diekman's union activities motivated its refusal to renew his teaching contract

Substantial evidence supports the Board's conclusion (JA 92) that, in terminating Diekman, the College "acted on its animus toward his support for separate representation of adjunct music faculty and, more especially, toward his conduct in connection with TAFC's statutorily protected memorandum . . . ." Indeed, the College essentially admitted to Diekman in its September 9, 1996, letter that it terminated him because of his TAFC association. First, it specifically conceded that TAFC's February 27, 1996, memorandum to FAC was one reason for releasing Diekman. As the College complained, Diekman deserved discipline because he and "two others wrote a complaint to the Faculty Affairs Committee . . . in which [he] knowingly included many overstatements and misstatements concerning the music department

and its leadership that were inflammatory and unsupported by evidence." (JA 688.) Second, the College cited TAFC's October 30, 1995, letter to Kelly complaining about the creation of the AFCC as a ground for Diekman's discharge. (JA 687.) As shown below, the College could not lawfully discharge Diekman for engaging in this protected activity.[7]

Without doubt, the TAFC memorandum and the letter to Kelly were protected communications under the Act. As noted previously, the memorandum deals in substantial part with wages, benefits, and other compensation issues. In submitting the document, TAFC also lodged complaints about union discrimination and made requests to play a more substantial role in academic governance. The October 30, 1995, letter to Kelly protested the College's dismissive treatment of TAFC. If the Act protects nothing else, it protects the right of a labor organization to petition for better wages, higher benefits, and a stronger voice in the workplace. See 29 U.S.C. § 151 (establishing that the Act

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[7] Although TAFC was not a union certified by the Board as the exclusive bargaining representative of the College's adjunct music professors, the Board found (JA 90), and the College concedes (JA 7), that TAFC is a labor organization entitled to the protections of the Act. See Section 2(5) of the Act (29 U.S.C. § 152(5)). Consequently, the College's argument (Br 46) that the Board must demonstrate that Diekman's activity was "concerted" is simply incorrect. Rather, any action taken to assist a labor organization is per se entitled to the Act's protection. See 29 U.S.C. § 157; NLRB v. City Disposal Systems, 465 U.S. 822, 831 n.8 (1984).

protects "the exercise by workers of full freedom of association, self-organization, and designation of representatives . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection"); see also 29 U.S.C. § 157; Yesterday's Children, Inc. v. NLRB, 115 F.3d 36, 48 (1st Cir. 1997) (concluding that an employee's letter to her employer was "obviously" protected).

The College defends its reliance on the TAFC memorandum to FAC by contending (Br 50) that the memo's tone, rather than its content, was objectionable. As McKinsey complained in her September 9, 1996, termination letter to Diekman, TAFC's memorandum to FAC

> knowingly included many overstatements and misstatements concerning the music department and its leadership that were inflammatory and unsupported by evidence. Some of the charges were extremely serious, such as that you were "persecuted," "lied to," and "threatened" by the chair or other regular faculty, yet none of these was backed by evidence. Professional norms require that arguments and allegations be accurate, fair, and supported by evidence . . . .

(JA 688.) To the extent that the TAFC memorandum employed hyperbole, exaggeration, or even factual misstatements, such occurrences are expected in labor relations. See NLRB v. Hawthorn Co., 404 F.2d 1205, 1215 (8th Cir. 1969) (noting that debates marked by "'vehement, caustic, and sometimes unpleasantly sharp attacks', [are] not an unfamiliar phenomenon in labor-management controversies") (quoting Linn v. United Plant Guard Wkrs., 383 U.S. 53, 62 (1966)). In the end, the College must

simply accept TAFC's alleged overstatements and minor falsehoods as part of the rough and tumble of labor relations. As the Fourth Circuit has recognized, even where "derogatory attacks destroy, as the [employer] puts it, 'the positive work atmosphere,' . . . the values of free speech and union expression outweigh employer tranquility . . . ." NLRB v. Southern Maryland Hosp. Ctr., 916 F.2d 932, 940 (1990). The Act prohibits the College from disciplining employees merely for speaking in hyperbolic language or making false assertions. See id. ("It is well established that . . . employers may not proscribe and punish [employees] for publication of false or inaccurate statements.").[8]

The College's citation to TAFC's October 30, 1995, letter to Kelly as a ground for termination was also an obvious reference to protected activity. It is reasonable to infer that the reference to the letter, couched in a criticism of TAFC's alleged signing of Hamilton's name, was simply one more manifestation of the College's hostility to TAFC and a clear indication of its antiunion motivation.[9]

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[8] As the Board found, the College was unable to articulate a single one of the allegedly "inflammatory and unsupported" statements that supposedly justified meting out discipline to the TAFC members. (JA 90.) The College's inability to identify these assertions casts doubt on whether they were truly of concern to the College or whether they were simply a pretext to allow the College to punish the TAFC authors.

[9] In any event, the College had no business disciplining Diekman for allegedly signing Jim Hamilton's name without his

In short, the College has admitted to punishing Diekman, at least in part, because of his TAFC activities, which were protected by the Act. This admission is direct evidence of the College's antiunion motivation in releasing Diekman from his contract.

In addition, the record is replete with other evidence establishing the College's dislike of Diekman's union activities. As this Court has noted, an "inference of unlawful motive may be drawn from the employer's hostility to the union." Mississippi Transport, Inc. v. NLRB, 33 F.3d 972, 979 (1994) (citing Hall v. NLRB, 941 F.2d 684, 688 (8th Cir. 1991)).[10] For instance, early on in TAFC's history, in June 1995, then-department chair Archbold subjected the members of TAFC to a 30-minute lecture

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permission. In doing so, the College punished Diekman for his participation in an internal union dispute about who was authorized to speak for the union. It is well-settled that an employer may not take sides in an internal union dispute, and therefore may not discipline an employee for his role in the confrontation. Cf. Howland Hook Marine Terminal, 263 NLRB 453, 454 (1982) (noting that "[t]he designation of [union] agents is purely an internal union affair" in which an employer has no voice); accord Modern Drop Forge Co., 326 NLRB No. 138, slip op. at 10, 1998 WL 700002, at *8 (Sep. 30, 1998). Furthermore, the College may not stand as the champion of Hamilton's right to refrain from union activity. See Brooks v. NLRB, 348 U.S. 96, 103 (1954) (holding that the employer may not refuse to bargain to vindicate employee rights).

[10] Contrary to the College's suggestion (Br 30), its history of receptiveness to union activity did not compel the conclusion that it harbored no animus for TAFC. Rather, as the Board recognized (JA 91), an employer may violate the Act by acting on animus toward a particular representative or a distinct series of union activity. See W.F. Bolin Co. v. NLRB, 70 F.3d 863, 871 (6th Cir. 1995) (finding animus even where the employer had not "expressed hostility towards unionization per se").

about the ways things are, the way they have always been, and the way they were going to stay. Signaling a theme that would continue throughout the next year, Kelly then immediately signaled his strong concern about the economic costs of a union presence in the department.

Additionally, even though TAFC informed the College in June 1995 that it would be conducting elections for a successor committee in the fall,[11] the College nevertheless formed its own in-house adjunct committee, the AFCC. In doing so, the College made very clear to the adjunct faculty in an October 29, 1995, memo that the AFCC was the "only . . . Departmental committee for adjunct faculty concerns." (JA 557.) The College never explicitly prevented TAFC from operating; however, it did force TAFC to use the AFCC as a conduit for any proposals or grievances. As the Board logically concluded (JA 92), "[g]iven the timing of [AFCC's creation], and given the absence of any legitimate explanation . . ., it is a fair inference that [the College] . . . created the AFCC as a means for eliminating separate representation of adjunct music faculty and, also, for eliminating [the adjuncts'] desire for separate representation."

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[11] The College argues (Br 29) that it was unaware of TAFC's plans to elect a successor committee. The Board, however, discredited Kelly's testimony to this effect, (JA 66), and explicitly found that the AFCC's creation was an attempt to curtail independent representation by TAFC, (JA 92).

In fact, the Supreme Court has recognized that an employer's maintenance of a dominated labor organization "may be a ready and effective means of obstructing self-organization of employees and their choice of their own representatives." NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 266 (1938) (affirming Pennsylvania Greyhound Lines, Inc., 1 NLRB 1 (1935)). Cf. Beverly Farm Foundation, Inc., 323 NLRB 787, 796-97 (1997) (finding that the employer's threat to form an employee/management committee was unlawful because it was designed to undermine employee support for the union), enforced, 144 F.3d 1048 (7th Cir. 1998).

Further demonstrating the College's animosity to TAFC is Kelly's reaction at the time of TAFC's February 1996 memorandum to the FAC. In transmitting a copy of the memorandum to McKinsey, Kelly asserted that the TAFC memo would lead to a "waste [of the FAC's] and my valuable time with a response." (JA 669.) The memorandum and its fallout, of course, directly led to Kelly's July 17, 1996, memoranda recommending discipline of the three TAFC activists.

In these July 1996 memoranda, Kelly relied on TAFC's February 1996 memorandum to FAC, as well as TAFC's October 1995 letter to Kelly regarding his creation of the AFCC, as grounds for disciplining each of the TAFC activists. Indeed, Kelly suggested reprimanding Deichert for no reason other than these TAFC activities. This simple fact strongly suggests that the

College wanted to discipline Diekman, like Deichert, solely to punish his protected activity and would have taken action against Diekman regardless of whether he had engaged in non-TAFC related misconduct.

Although the College declined to issue discipline based on Kelly's July 1996 memoranda, those written proposals did persuade the College to single out the three TAFC activists for individual meetings in which their jobs were contingent on committing to "professional" behavior. As the Board found, meetings with adjunct professors before contract renewal were "unprecedented."[12] (JA 92.) Subjecting union activists to unique discipline gives rise to an inference of antiunion animus. See Concepts & Designs, Inc. v. NLRB, 101 F.3d 1243, 1245 (8th Cir. 1996) (enforcing Board's finding of discrimination where the employer took action against the two employees who initiated the organizing campaign).

Under the foregoing circumstances, substantial evidence supports the Board's conclusion that Diekman's protected activity

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[12] The College argues (Br 52) that these meetings were not unprecedented because "[d]isputes involving faculty conduct are uniquely within the Dean's authority . . . ." This argument misses the mark completely. Whether the Dean had the authority to discipline faculty is not the issue. Rather, the issue is whether the College had previously conditioned adjuncts' contract renewal on a precontract meeting. Here, the evidence showed that these meetings "hadn't [occurred] in the past" (JA 388); thus, the Board properly found that they were "unprecedented."

was a motivating factor in the College's decision to take adverse action against him. See Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083, 1089 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

2. The College failed to show that it would have refused to renew Diekman's contract in the absence of his protected activity

In an attempt to deflect attention from having admitted its discriminatory motive for terminating Diekman's contract, the College argues (Br 46-49) that its alleged concerns with Diekman's "professional" conduct were legitimate, and contends (Br 36-42) that, despite these concerns, it would have renewed Diekman's contract if he had committed to abide by "professional" expectations. As shown below, however, the three allegedly legitimate concerns articulated in the College's September 9, 1996, discharge letter to Diekman, and the College's demand that Diekman adhere to vague "professional" goals, were mere pretexts to mask discriminatory action.[13]

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[13] Significantly, as with any affirmative defense, the College's burden is one of persuasion; that is, the College was required to prove by a preponderance of the evidence that it actually would have discharged Diekman for a nondiscriminatory reason. See Town & Country Elec., Inc. v. NLRB, 106 F.3d 816, 821 (8th Cir. 1997); Mississippi Transport, Inc. v. NLRB, 33 F.3d 972, 978 (8th Cir. 1994).

The facts surrounding the College's proffered justifications are as follows.[14] First, the College received two reports that Diekman was threatening to sabotage Valdivia's third-year tenure review. Both of these reports arrived shortly after Diekman's voluble conflict with Valdivia over a January 1996 telephone conversation about wage rates for adjuncts who were union members. The anger arising from this conversation sparked noticeable fallout, leading to an exchange of correspondence and meetings with Kelly and McKinsey. (JA 75-78.)

The first of the reports concerned an allegedly threatening incident in November 1995. Professor Ron Rodman and Diekman were in Rodman's office, discussing the applied music program generally and Valdivia's orchestra direction in particular. While discussing Valdivia, Diekman told Rodman that he was "going to get" Valdivia because he "didn't like him." (JA 78; 499.) Although Rodman was startled by the comment, he did nothing about it until the following semester, when a conversation with Professor Jackson Bryce revealed that Bryce had a similar discussion with Diekman. (JA 80; 500.)

Bryce's conversation with Diekman occurred in late February or early March 1996, when Diekman asked Bryce, who served on the

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[14] The College devotes several pages of its brief (Br 47-49) to demonstrating that Diekman's alleged threats to undermine Valdivia's tenure efforts, his complaints to students, and his threat to withhold student grades were not protected by the Act. The Board, however, made no finding that such activity was protected. (JA 93-95.)

College's tenure and promotion committee, about the role of student input in the tenure process. After Diekman learned how important student opinion was to the tenure decision, he said, "Boy, there is something we can do something about that." (JA 402.) Although Bryce recalled it as an odd comment, he thought nothing further about it until he heard Valdivia complain about his trouble with clarinet students. When Bryce realized that Diekman taught many of the clarinet students, he made the connection and told Valdivia about Diekman's comment. (JA 79; 404.)

Shortly thereafter, in late March 1996, Valdivia brought Diekman's conversations with Rodman and Bryce to Kelly's attention. (JA 80; 512.) Kelly eventually asked the two professors to document their conversations in writing, (JA 80; 356, 358), which they did, Rodman on April 15, 1996, and Bryce on May 22, 1996. (JA 80; 781 (Bryce), 782 (Rodman).) Although he had notice of these allegedly serious threats by early April 1996, Kelly made no effort to investigate their veracity or allow Diekman to respond, until the September 5, 1996, contract renewal meeting. (JA 79.)

The College's second legitimate justification surrounded two incidents where Diekman supposedly complained to students about the department. On May 27, 1996, a graduating senior approached Kelly and told him that, in Fall 1992, she stopped taking clarinet lessons with Diekman because she was dissatisfied with

the quality of his instruction. (JA 75; 362-63, 517.) Kelly then asked her whether Diekman ever complained to her about the department, and she replied in the affirmative. (JA 75; 363.) Kelly then memorialized only the latter part of the conversation in a memo to file. (JA 75; 675.)

Subsequently, on June 4, 1996, Kelly had a conversation with another graduating senior who had written him a six-page letter criticizing Valdivia's orchestra direction. (JA 75; 365, 783-88.) In both the letter and the conversation, this student had mentioned that Valdivia had defaulted on his promise to pay Diekman mileage for a particular trip. (JA 75; 365, 787.) During their talk, Kelly asked the student how she knew this information, and she confirmed that Diekman had told her. (JA 75; 365.) Kelly, however, did not ask about the circumstances surrounding the student's conversation with Diekman, nor did he ask Diekman about it. Instead, he simply documented it for his files. (JA 74; 675.) Finally, in declining to renew Diekman's contract, the College also allegedly relied (Br 49) on Diekman's threat to withhold student grades until he received his mileage check. (JA 686-89.)

The Board reasonably concluded (JA 94-95) that the foregoing incidents were merely straw men designed to obscure the College's anti-TAFC animus. First, demonstrating that these offenses were not as serious as the College asserts is the fact that the College failed to investigate a single one of them. (JA 93.)

After hearing the allegations about Diekman's conversations, neither Kelly nor McKinsey probed further by asking students if Diekman attempted to poison their attitudes against Valdivia or whether he had complained to them about the department. (JA 457-58, 504.) Nor did either of them ask Diekman for a response to their concerns. For that matter, the College never investigated Hamilton's claim that TAFC signed his name to a letter without his permission, even after Diekman and Kodner denied the accusation and offered phone records to prove they consulted Hamilton first. (JA 93; 163, 262, 381-82, 453.) Instead, Kelly simply filed the reports away and saved them until he was ready to issue discipline against Diekman. See Handicabs, Inc. v. NLRB, 95 F.3d 681, 685 (8th Cir. 1996) (finding that the employer's failure to "engage in any independent investigation of the charges" beyond the initial complaint evidenced pretext), cert. denied, 521 U.S. 1118 (1997); accord Mississippi Transport, Inc. v. NLRB, 33 F.3d 972, 979 (8th Cir. 1994); Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1509 (8th Cir. 1993).

In a similar vein, even when the College finally confronted Diekman about its alleged concerns at the September 5, 1996, meeting, it failed to give him sufficient information to adequately respond. McKinsey never told Diekman the identity of the two professors who accused him of threatening Valdivia, nor did she identify the students to whom Diekman allegedly complained. Additionally, she failed to tell Diekman the

circumstances surrounding the complaints, rendering him unable to offer any legitimate explanation. Under these circumstances, as the Board found (JA 93), the College's "approach shows that it was more concerned with reciting facially legitimate reasons [for the discipline], than [with] ascertaining" whether the charges were actually true. See Handicabs, 95 F.3d at 685 (holding that a failure to give an employee the opportunity to respond to allegations supported the Board's finding that the discharge was illegal); Mississippi Transport, 33 F.3d at 979 (same). In sum, the College's failure to seriously investigate these allegedly weighty charges or provide Diekman any realistic chance to defend himself demonstrates that the asserted legitimate motives were a pretext to hide its disdain for Diekman's TAFC-related activity.

Further buttressing the Board's conclusion that the College merely recited facially legitimate reasons to support Diekman's termination in order to conceal its true unlawful motive, is the fact that Kelly gathered all of his supporting evidence in the 50 days following the submission of the TAFC memorandum. In April and May 1996, Kelly specifically requested Rodman and Bryce to reduce their stories to writing and formally documented the student complaints himself. He even received a memorandum from Hamilton at the end of May documenting TAFC's use of his name seven months earlier. (JA 68; 701.) The College failed to explain why it assembled all of this documentation. Moreover, this accumulation of paper was all the more suspicious in light

of Diekman's clean prior record. See Concepts & Designs, Inc. v. NLRB, 101 F.3d 1243, 1245 (8th Cir. 1996) (concluding that the terminated employees' "unblemished" disciplinary records supported a finding of unlawful motive); accord NLRB v. Grand Foundries, Inc., 362 F.2d 702, 709 (8th Cir. 1966); NLRB v. Des Moines Foods, 296 F.2d 285, 289 (8th Cir. 1961). As the Board concluded (JA 94), this rush to assemble a paper trail casts doubt on the validity of the College's assertions of legitimate motive.

In light of the foregoing, the Board reasonably concluded that the College was not as seriously concerned with the non-TAFC related incidents as it now suggests. Instead, those incidents were pretexts, used by the College to create a veneer of legitimacy to hide its unlawful motive.

Finally, the Board properly rejected (JA 95-97) the College's contention (Br 36-42) that Diekman's refusal to commit to "professional norms" in the September 5, 1996, meeting justified releasing him from his contract. As shown below, two basic reasons validate this conclusion.[15]

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[15] The College has not argued, as it did below (JA 96), that Diekman's alleged foul language and offensive behavior during the meeting justified his dismissal. The Board had rejected (JA 96) this argument below, discrediting the College's witness, who testified that Diekman used profane language, and finding that Diekman's offensive metaphor and two off-color phrases did not deprive him of the Act's protection.

First, as the Board found (JA 94-95), the College placed Diekman in a situation where he would naturally be "apprehensive of retaliation" against him for his union activities, and therefore on the defensive. Diekman knew that the College had singled out the three TAFC activists for unprecedented meetings to discuss the future of their employment at the College. Then, at the meeting, the College chastised Diekman for engaging in protected activity, and began to debate the merits of the TAFC memorandum. Further, the College sprung other grounds for discipline on Diekman without warning. Under these circumstances, where the College knowingly placed Diekman in an inherently defensive situation and then attacked his protected activity, the Board reasonably found that Diekman's "defensive reactions--and, even, sometimes rude responses"--could not be grounds for discipline against him. See NLRB v. Vought Corp., 788 F.2d 1378, 1383-84 (8th Cir. 1986) (finding that an employer could not discharge an employee for "insubordination" provoked by the employer's illegal discipline); see also Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1509-10 (8th Cir. 1993) (holding that an employer could not discipline an employee for her "poor attitude," where the employer's unfair labor practices caused the employee's depression).

Second, rather than simply asking Diekman to refrain from engaging in a particular activity, the College framed its demands only in terms of vague references to "professional behavior."

The Board, adopting the administrative law judge's credibility determinations (which he based on his "observ[ations] of the witnesses"),[16] concluded that the College "deliberately phrased those commitments as generalities . . . to secure [Diekman's] acquiescence in foregoing activity protected by the Act without actually saying anything that could later be used to show that [it] was doing so." (JA 96.)

The ambiguity inherent in the College's references to "professional responsibilities" was made clear during the course of the events. Professionalism, left undefined, can have any number of meanings. At the September 5, 1996, meeting, McKinsey never defined the meaning of the term; instead, she simply catalogued the charges against Diekman, including his TAFC activity. After engaging in an extended argument with Diekman about the merits of the TAFC memorandum, McKinsey asked Diekman whether he would abide by "professional expectations" in the future. It was utterly reasonable for Diekman to interpret McKinsey's request as a demand that he not "go to the paper any

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[16] This Court has concluded that credibility findings are for the administrative law judge to make in the first instance, and they will not be set aside absent extraordinary circumstances. See Town & Country Electric, Inc. v. NLRB, 106 F.3d 816, 819-20 (8th Cir. 1997). As the Second Circuit has pithily observed, "[w]hen the NLRB's findings are 'based on the ALJ's assessment of the credibility of witnesses, they will not be overturned unless they are hopelessly incredible or they flatly contradict either the law of nature or undisputed documentary testimony.'" Kinney Drugs, Inc. v. NLRB, 74 F.3d 1419, 1427 (2d Cir. 1996) (quoting NLRB v. Gordon, 792 F.2d 29, 32 (2d Cir.), cert. denied, 479 U.S. 931 (1986)).

more and [stop] complain[ing] publicly" about the College, (JA 269); in essence, as an ultimatum to cease engaging in protected activity. The College could not punish Diekman for refusing to make a commitment to "professional behavior," because "[t]here was no way . . . that acquiescence in such generalized demands would not leave an employee believing that he . . . was being asked to obligate himself . . . to forego at least some statutorily protected activity." (JA 96.) Thus, Diekman's refusal to give the College the commitment it requested was justified.

Under the foregoing circumstances, Diekman's termination was without legitimate justification, and, as the Board found, in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). This Court should enforce the Board's order.

CONCLUSION

For the foregoing reasons, the Board respectfully requests this Court to enter judgment denying the College's petition for review and enforcing the Board's order in full.

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